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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 619

THE MASON & DIXON LINES, INC.
Petitioner

v.

GENERAL ELECTRIC COMPANY
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. H. DOUGHTY AND
JOHN H. LOCKE
Attorneys for Respondent

HODGES, DOUGHTY & CARSON
715-723 Hamilton National Bank Bldg.
Knoxville, Tennessee

GENTRY, LOCKE & RAKES
Suite 511 Boxley Bldg.
Roanoke, Virginia
Counsel for Respondent

ROANOKE PRINTING CO., INC., ROANOKE, VA.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is reported in 170 F. Supp. 698. The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 270 F. (2d) 780.

JURISDICTION

Judgment of the Court of Appeals was entered on September 16, 1959. The Petition for a Writ of Certiorari was filed on December 30, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254. (1).

STATUTES AND REGULATIONS INVOLVED

1. 49 U. S. C. 319 is set forth in the Appendix hereto at page A-1.

2. 49 U. S. C. 20 (11) is set forth in the Appendix hereto at page A-1.

3. 49 U. S. C. 316 (b) is set forth in the Appendix hereto at page A-2.

4. 49 C. F. R. 192.9 (a) and (b) and 49 C. F. R. 193.9 (a) and (b) are set forth in the Appendix hereto at page A-3.

5. Rule 21 and Rule 22 of National Motor Freight Classification No. A-3 M. F. - I. C. C. No. 8, published and promulgated by the American Trucking Association are set out in the Appendix hereto at page A-3.

QUESTIONS PRESENTED

1. The real question presented in this case is, WHO, as between a shipper and a motor vehicle common carrier, has the duty to see that the load is safe for transportation.

2. Secondary questions raised involve matters of procedure and legal principles of indemnity.

STATEMENT OF CASE

This is a common law negligence action involving questions of indemnity which was instituted by Kelly C. Moretz in the United States District Court for the Western District of Virginia.

General Electric Company manufactures electrical equipment which it ships to customers all over the United States. The Mason & Dixon Lines, Inc. is a motor vehicle common carrier. Kelly C. Moretz was an employee of The Mason & Dixon Lines, Inc., an "over-the-

road driver," in the scope of his employment, when a tractor-trailer, loaded with General Electric Company's products, which he was driving, turned over on February 22, 1957.

Claiming that General Electric Company negligently loaded the trailer and failed to brace the cargo, Kelly C. Moretz instituted suit against General Electric Company. Shortly thereafter, General Electric Company filed a Third-Party Complaint against The Mason & Dixon Lines, Inc. claiming indemnity from said Mason & Dixon Lines, Inc. in the event it should be held liable to Moretz. A jury trial was held in the United States District Court for the Western District of Virginia with *all parties* participating throughout. The Trial Judge charged the jury as to respective rights and duties and after the verdict in favor of Kelly C. Moretz against General Electric Company, submitted an Interrogatory to the jury covering the duties of The Mason & Dixon Lines, Inc. The jury found that The Mason & Dixon Lines, Inc. was guilty of a breach of duty which proximately contributed to the accident.

The Trial Judge, after having had the various factual issues determined by the jury, took the question of law involved in the indemnity issue under consideration. After mature consideration the Trial Court held that it could not spell out any contractual duty on The Mason & Dixon Lines, Inc. to load and transport the cargo safely and that the Tennessee Workmen's Compensation Act was a bar to General Electric Company's claim for indemnity against The Mason & Dixon Lines, Inc.

An appeal was taken to the United States Court of Appeals for the Fourth Circuit by General Electric Company and it reversed the District Court on these points, holding that the contract of The Mason & Dixon Lines, Inc. for the carriage of the goods embraced the liability to indemnify General Electric Company, in case it suf-

fered loss occasioned by the neglect of the carrier and that the Tennessee Workmen's Compensation Act did not bar this right to indemnity. The Fourth Circuit held that it was plain that The Mason & Dixon Lines, Inc. assumed the direct and specific obligation to General Electric Company to secure the cargo safely so that it did not shift during the movement, and became liable for any loss caused by its failure to carry out its promises, unless it was excused by some action on behalf of the General Electric Company. It stated in part:

> "It should be borne in mind, in this connection, that the transportation of the goods during which the loss occurred lay entirely in the hands of the carrier and that the initial failure of the shipper to load the goods properly in no way prevented the carrier from carrying out its own statutory contractual duties. Moreover, the requirement of the tariff that the shipper bear the burden of loading heavy or bulky goods was specifically inserted as part of the consideration moving from the shipper for the carriage of the goods at the published rate. It was not intended to shift to the shipper a duty ordinarily imposed upon the carrier. This becomes the more clear from the provision of the tariff that the carrier itself might do the work upon payment by the shipper of the expenses involved. Clearly the carrier was not excused from carrying out its primary obligation to the shipper to make certain that the cargo delivered to it unharmed was not sent out over the public roads in a dangerous condition."

There is no where in this case any finding or holding that General Electric Company had a written contractual obligation to load and brace the equipment in question. It did undertake to load it as a measure of convenience and necess but as between General Electric Company and The Mason & Dixon Lines the ultimate

duty to brace, if bracing was needed, always rested on The Mason & Dixon Lines, Inc. (See testimony Nicholas F. Behme, Jr., Chairman of National Classification Board of the Motor Carrier Industry, R. pgs. 175, 176, 177, 178.) Further, General Electric Company, while it had had experience with packing and crating, was certainly not an expert with regard to bracing an over-the-road shipment. The Mason & Dixon Lines, Inc. was the transportation expert in this case.

We cannot agree with Petitioner's contention on page 7 of its Petition that the Court of Appeals made a factual determination on the question of indemnity. The Court of Appeals merely applied proper law to the factual determination which had been made by the jury. The evidence was uncontradicted that The Mason & Dixon Lines, Inc. had caused the shipment to be transported on the road with actual knowledge that it was in an insecure condition and without any effort to correct it. Further, the uncontradicted facts showed that General Electric Company was guilty of no breach of duty toward The Mason & Dixon Lines, Inc.

ARGUMENT

POINT I

GENERAL ELECTRIC COMPANY WAS PLAINLY ENTITLED TO INDEMNITY IN THIS CASE.

The Petitioner in this case seeks to bring before this Court for review a decision which, in holding Petitioner liable to indemnify the shipper for the claim of an injured plaintiff, turns upon the application of well established principles of law under the facts and circumstances of this case. The decision of the Court of Appeals reaches results which are clearly correct and just.

It conforms with all opinions of this Court on the questions involved. No conflicts exist, and no novel variations require further consideration or reiteration by this Court of the applicable general principles.

When you brush away all the surplusage with regard to the present issue of indemnity, the only thing that is left is, as between The Mason & Dixon Lines, Inc. and General Electric Company, *who* had the duty to brace and see that the load was safe and secure for transportation over the highways. We submit that The Mason & Dixon Lines, Inc., a motor vehicle common carrier and a transportation expert, had the non-delegable duty to see that the load was safe and secure for transportation. *United States* v. *Savage Truck Line, Inc.*, 209 F. (2d) 442 (C. C. A. 4th Cir. 1953); 44 A. L. R. (2d) 984, cert. den. 347 U. S. 952, 98 L. Ed. 1098, 74 S. Ct. 677 (1954). The uncontradicted evidence shows that it breached this duty and it even admits this. *Pet. pg. 7, §(7)*. However, it is now attempting to confuse the issue and contend that General Electric Company's duty to it was the same as it was to the injured plaintiff. This is simply not correct because under all the applicable rules and regulations the only duty that General Electric Company owed to The Mason & Dixon Lines, Inc. was to pay for the transportation of the goods.

Of course, when General Electric Company undertook to load the cargo it had a duty to the truck driver and other individuals to see that the truck was properly loaded. However, as between General Electric Company and The Mason & Dixon Lines, Inc., this duty rested on The Mason & Dixon Lines, Inc. Therefore, there was nothing in this case for a jury to decide on the question of General Electric Company's action. As this Court pointed out in *Ryan Stevedoring Company* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956), the indemnity issue turns on the respective

rights and duties of the parties to each other, not to the original plaintiff.

We do not have here a situation in which the carrier's breach of duty brought about the injuries by operating upon a prior condition caused by the shipper's negligence, *which condition was unknown to the carrier*. Cf. *Hagans* v. *Farrell Lines*, 237 F. (2d) 477 (C. C. A. 3rd 1956), which decision unduly limits the scope of *Ryan, supra*, and was certainly impliedly overruled by this Court in 1959. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 3 L. Ed. (2d) 413, 79 S. Ct. 445 (1959). Here, in the instant case, the motor vehicle common carrier was fully informed of the facts that the load needed bracing. It admits that it was cognizant of the possible consequences of the shipper's negligence. It further admits that it intended to brace the load in question. However, in the face of all this, and with actual knowledge thereof, The Mason & Dixon Lines, Inc. let the load go out onto the highway and therefore put into operation an immediately dangerous force. Clearly it was The Mason & Dixon Lines's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury. There was nothing General Electric Company did or did not do, as between it and The Mason & Dixon Lines, which could be pointed to as a breach of duty owed by General Electric Company to The Mason & Dixon Lines, Inc.

Even if it is argued that General Electric Company's failure to brace was a breach of duty by it, the motor vehicle common carrier was fully aware of this condition prior to plaintiff's injury and nonetheless willingly proceeded to accept the shipment and send it out on the highway, despite the known dangerous condition. Therefore, even on Petitioner's own theory The Mason & Dixon Lines, Inc. would be held to have waived the breach. *Restatement, Contracts* §§ 294, 297 (1932);

American President Lines, Ltd. v. *The Marine Terminals Corp.*, 234 F. (2d) 753 (C. C. A. 9th Cir. 1956), cert. den. 352 U. S. 926, 1 L. Ed. (2d) 161, 77 S. Ct. 222 (1956).

It must be remembered that there was no conflict in the evidence in this case on the question of indemnity. Petitioner does not even suggest any conflict or disputed factual issues. However, Petitioner attempts to raise a constitutional question by contending that it was deprived of its right to a jury trial. In this connection Petitioner cites the case of *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 2 L. Ed. (2d) 491, 78 S. Ct. 438 (1958).

Petitioner has not been deprived of its constitutional right to a jury trial in the instant case and *Weyerhaeuser* is no basis for such a contention here. In the *Weyerhaeuser* case none of the facts on the indemnity issue were determined at the time of trial. Here, the uncontradicted evidence and the jury's verdict determined all factual issues on the question of indemnity. Certainly, neither *Weyerhaeuser* nor the Seventh Amendment to the Constitution requires a Federal Judge to leave it to the jury to determine the legal liability of a third-party defendant after the facts have all been ascertained. Obviously, this is a question of law for the Judge. See *Galloway* v. *United States*, 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077 (1943).

POINT II

PETITIONER SHOULD NOT NOW BE ALLOWED TO RAISE THE QUESTION OF ITS RIGHT TO A JURY TRIAL FOR THE FIRST TIME.

Although it is clear from what has been said heretofore that the Petitioner has not been denied its constitutional right to a jury trial it is interesting to note that the

first time Petitioner raised this question, or insisted on it, was in its Petition for a Rehearing in the United States Court of Appeals for the Fourth Circuit. Petitioner made no requests for a jury trial in the District Court, nor was there any objection to the jury trial afforded it. Petitioner, through its counsel, participated in all pre-trial procedures, made an opening statement to the jury, was permitted to examine and cross-examine witnesses, was permitted to offer evidence, and was permitted to present argument to the jury. Also, although the District Judge requested proposed charges and Interrogatories Petitioner offered none. The Petitioner in this case made no attempt in the District Court to have the issue of General Electric Company's conduct submitted to a jury.

The law has always been, and this Court has consistently held, that the failure to request a given issue be submitted to a jury constitutes a waiver of any right to such submission. *Pennsylvania Railroad Co.* v. *Minds*, 250 U. S. 368, 63 L. Ed. 1039, 39 S. Ct. 531 (1919); *United States* v. *Atkinson*, 297 U. S. 159, 80 L. Ed. 557, 56, S. Ct. 392 (1936). Certainly a prerequisite for raising such failure on appeal is notice to the Trial Court by way of an objection. *F. R. C. P.* 49, 51. No request was made to have this issue submitted and no objection was made in the Trial Court in this case. Therefore, we earnestly submit that Petitioner has waived its right to raise this issue and that same cannot be now raised for the first time on appeal.

POINT III

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS FROM ANY OTHER CIRCUITS, BUT IS CLEARLY PROPER AND CORRECT AND IN KEEPING WITH THE LAW LAID DOWN BY THIS COURT.

Petitioner asserts that the instant case is most unusual. However, such assertion is simply not correct. Approximately five years ago this Honorable Court approved an identical holding in a case practically "on all fours" with the instant case. *United States v. Savage Truck Line, Inc.*, 209 F. (2d) 442 (C. C. A. 4th Cir. 1953), 44 A. L. R. (2d) 984, cert. den. 347 U. S. 952, 98 L. Ed. 1098, 74 S. Ct. 677 (1954). Also, less than four months ago this Honorable Court approved the application of principles of indemnity identical to those presented here. *Calmar S. S. Corp. v. Nacirema Operating Co.*, 266 F. (2d) 79 (C. C. A. 4th Cir. 1959), cert. den. No. 99, 4 L. Ed. (2d) 62 (1959).

Again, in *Crumady* v. *The J. H. Fisser, supra*, indemnity over was approved where injuries were caused by unsafe equipment furnished by the ship and used by the contractor.

The case of *Hagans* v. *Farrell Lines*, 237 F. (2d) 477 (3rd Cir. 1956) presents no conflict with the instant case. In the *Hagans* case the injuries were found to be the result of the shipowners' own breach of contract which violated its duty to the stevedoring company as well as the longshoreman. This is not true in the instant case because the duties of General Electric Company to Kelly C. Moretz as to making the cargo safe and secure for transportation do not likewise flow to The Mason & Dixon Lines, Inc. under the facts and law applicable

herein. Further, it would certainly appear as indicated heretofore that the *Haggans* case has been impliedly overruled by this Court with its recent decision in *Grumady v. The J. H. Fisser, supra.*

The case of *Irvin v. General Electric Company*, Civil No. 1275, E. D. Tenn., October 9, 1958 was one in which the District Court dismissed the Third-Party Complaint on the ground that it was not timely filed and on the further ground that the Tennessee Workmen's Compensation Act barred any claim to indemnity. Petitioner has now abandoned this latter contention in the instant case and therefore there can certainly be no conflict between this case and the *Irvin* case. This case follows in the footsteps of many others from various circuits in addition to those cited heretofore. See *American Export Lines, Inc., v. Revel*, 266 F. (2d) 82 (C. C. A. 4th Cir. 1959); *Burris v. American Chicle Co.*, 120 F. (2d) 218 (C. C. A. 2nd Cir. 1941); *Crawford v. Pope & Talbott, Inc.*, 206 F. (2d) 784 (C. C. A. 3rd Cir. 1953); *United States v. Arrow Stevedoring Co.*, 175 F. (2d) 329 (C. C. A. 9th Cir. 1949); *Lundberg v. Prudential S. S. Corp.*, 102 F. Supp. 115 (D. C. N. Y. 1951); *Whitmarsh v. Durastone Co.*, 122 F. Supp. 806 (D. C. R. I. 1954); *Orlove v. Philippine Air Lines*, 257 F. (2d) 384 (C. C. A. 2nd Cir. 1958); *Rich v. United States*, 177 F. (2d) 688 (C. C. A. 2nd Cir. 1949); and *American District Telegraph Co. v. Kittleson, et al*, 179 F. (2d) 946 (C. C. A. 8th Cir. 1950).

This case presents no novel or unusual circumstances which would be of wide public or governmental interest. It is simply a common law negligence action.

The consequences will affect only the parties in this particular litigation. There is no departure from precedent and the decision of the United States Court of Appeals for the Fourth Circuit Court is eminently fair and just.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
GENERAL ELECTRIC COMPANY
BY J. H. DOUGHTY and
JOHN H. LOCKE
Attorneys for Respondent